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Supreme Court of the United States

October Term, 1958

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No. 582

VINCENT JOSEPH SPANO,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

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Opinion Below

The opinion of the Court of Appeals of the State of New York affirming the judgment of conviction of Murder in the First Degree, rendered by the County Court, Bronx County, is reported *sub. nom. People* v. *Spano,* at 4 N. Y. 2d 256.

Jurisdiction

The jurisdiction of this Court rests upon 28 U. S. C. § 1257 subd. 3, and 28 U. S. C. § 2101(d).

Questions Presented

1. Whether petitioner, who had been previously indicted by the Grand Jury of Bronx County for the crime of Murder, First Degree, was entitled, under the Fourteenth Amendment of the United States Constitution, to have an attorney present during the course of a prearraignment interrogation conducted by the New York City Police and an Assistant District Attorney.

2. Whether petitioner's rights, under the Fourteenth Amendment of the United States Constitution, were violated by the admission into evidence, at his trial, of a voluntary confession obtained during the prearraignment interrogation.

Constitutional Provisions and Statutes Involved

U. S. Const. Amend. XIV:

Section 1.

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N. Y. Const. art. I, § 6:

> "* * * [I]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. * * *
>
> "No person shall be deprived of life, liberty or property without due process of law."

N. Y. Code Crim. Pro. § 165:

> "The defendant must in all cases be taken before the magistrate without unnecessary delay * * *."

N. Y. Code Crim. Pro. § 301:

> "The bench warrant issued upon the indictment must, if the crime be a felony, be substantially in the following form:
>
> * * *
>
> "You are, therefore, commanded forthwith to arrest the above named * * *, and bring him before that court * * * to answer the indictment; or if the

court have [sic] adjourned for the term, that you deliver him into the custody of the * * * warden of the city prison of the city of New York."

N. Y. Code Crim. Pro. § 308:

"If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel."

N. Y. Code Crim. Pro. § 395:

"A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor * * * ."

Statement

Petitioner was indicted on the 1st day of February, 1957 by the Grand Jury of Bronx County, for the crime of Murder, in the First Degree, in that on the 22nd day of January, 1957, he " * * * wilfully, feloniously and of his malice aforethought, did shoot and kill one Frank Palermo, Jr., with a Pistol and revolver" (10-12).*

The facts upon which the indictment was predicated are as follows:

Between 5:00 and 6:00 P. M. in the evening of January 22, 1957, petitioner, Vincent Joseph Spano, had an argument over money with the deceased, Frank Palermo, Jr., at the Roosevelt Bar & Tavern, in Bronx County. A fist fight ensued outside the tavern and petitioner, apparently, came off second best. The deceased then admonished Spano

* Figures in parentheses refer to folios of the record on appeal unless otherwise specified.

to bring some money to a candy store, where he would be waiting (104-122; 200-202; 904-906; 2475).

Petitioner walked from the scene of the affray to a furnished room he rented at 4650 Park Avenue, Bronx County; armed himself with a loaded revolver and walked back to the candy store where Palermo indicated he would be waiting. Spano, thereby, traversed a distance of fifteen to sixteen blocks in order to procure the weapon and arrive at the scene of the crime (2135, 2191, 2475, 2476). Petitioner was seen entering the store brandishing a pistol, by at least two eye-witnesses, Vincent Leone and Peter Guerriero, the latter of whom identified Spano at the trial (411-414, 790, 791, 1042).

Five bullets were discharged in two separate volleys at the deceased, who had arrived at the store a short time before Spano. With the exception of Guerriero, who had ducked behind a soda counter, three other persons, who had been in the store, namely, Neil DeLuca, Vincent Leone and a person known as Flanagan, fled when the shooting started (568, 569). This trio could not identify Spano as the killer.

Spano fled from the scene and did not return home (2423).

Anthony Napolitano, the owner of the Roosevelt Bar & Tavern, testified that a day or two following the crime petitioner had telephoned stating that he "was going to give himself up and that he was going to get a lawyer" (985, 986).

A rookie patrolman of the New York City Police Force, Garper Bruno, testified that he knew petitioner for about eight or ten years, having attended school with him (2252).

On February 3, 1957, at about 9:25 P. M., petitioner telephoned Bruno at home (2253, 2254). During this conversation, petitioner mentioned the fight with Frank Palermo and indicated that the deceased had administered a bad

beating upon him. He further stated that he was dazed and that "he went and shot at the deceased" (2267-2269).

Bruno, in response to petitioner's question as to what he should do, advised him to surrender (2267, 2268). On February 4, 1957, at about 7:10 P. M., Spano, accompanied by an attorney of his own choosing, Tobias Russo, gave himself up to the police and an Assistant District Attorney in front of the Bronx County Building (2105).

Petitioner was taken to the office of an Assistant District Attorney, inside the Bronx County building, where he was well fed at about 11:00 P. M. (1816-1818, 2116). Petitioner was questioned casually, but adamantly refused to answer any questions concerning the crime and advised the police officers to see his attorney (1837-1839, 2115). Spano was then taken to the 46th Detective Squad in Bronx County for "booking". Detective Ciccone asserted that Spano asked for his attorney, but the detective was unable to locate petitioner's attorney in the telephone book (1253-1255).

Detectives Lehrer and Farrell asserted that Spano never asked to see his lawyer (1840, 2115, 2206). In the early morning of February 5, 1957, at the 46th Detective Squad, Patrolman Bruno, Spano's friend, urged him to make a statement to the police, indicating that petitioner had caused Bruno a lot of trouble by telephoning him on February 3rd (2366-2383, 2388). Bruno asserted that at no time had he heard any hollering or screaming from the petitioner or anyone else (2299).

Although Officer Bruno observed some black and blue marks on petitioner, he testified that Spano never suggested that he had been beaten by the police, but had made a comment that the marks were just starting to go away (2310, 2312-2316).

Following his conversation with Patrolman Bruno, Spano gave a statement to an Assistant District Attorney which was substantially consistent with the statement he

had made over the telephone to Bruno prior to his surrender. Bruno, however, did recall that Spano mentioned the fact that he had asked to see his attorney.

In the automobile in which he was later transported to Police Headquarters for photographing, Spano remarked that he was not sorry that he had killed Palermo. "That guy was on my back all the time" (2049, 2140, 2229).

The petitioner was arraigned upon the opening of Court on February 5, 1957 (13, 14).

ARGUMENT

POINT ONE

The uncontradicted evidence clearly reveals that petitioner's confession was completely voluntary, and true.

There is not one iota of testimony in the record indicating that petitioner was in any way coerced, or that his confession was not completely voluntary.

Petitioner did not take the stand in his own defense and consequently the People's testimony, alone, must determine whether or not the confession was voluntary. A perusal of this testimony reveals that it was unequivocally voluntary.

It may be unfortunate, from petitioner's point of view, that he chose not to take the stand to rebut, if possible, the People's evidence, but as this Court pointed out in *Stein* v. *New York*, 346 U. S. 156 at 177:

> "In trial of a coercion issue, as of every other issue, when the prosecution has made a case to go to the jury, an accused must choose between the disadvantage from silence and that from testifying. *The Constitution safeguards the right of a defend-*

> *ant to remain silent; it does not assure him that he may remain silent and still enjoy the advantages that might have resulted from testifying.* We cannot say that petitioners have been denied a fair hearing of the coercion charge." (Italics ours.)

Spano's decision not to take the stand is puzzling in view of the fact that unlike the *Stein* case, Spano had no prior criminal record of convictions.

It is significant that the New York Court of Appeals was convinced that Spano's confession on February 4th was completely voluntary. Thus, that Court declared:

> "It is clear in the record, and the fact is not now seriously challenged, that this confession was neither physically nor psychologically coerced." *People* v. *Spano*, 4 N. Y. 2d 256, 260.

Even in the brief upon the appeal to this Court, petitioner does not seriously urge that his confession was in any way coerced.

A.

Petitioner was arraigned at the earliest possible opportunity.

Since petitioner had surrendered at 7:10 P. M. on February 4, 1957, which was after the County Court, Bronx County, had recessed for the day, it was not feasible to arraign him until the following morning. Petitioner was arraigned upon the opening of Court on February 5th.

It is significant that the bench warrant that had been issued for his arrest directed that petitioner be delivered to the Warden of the City Prison only if the County Court had "*adjourned for the term*". This Court's attention is directed to the fact that the County Court had merely *recessed for the day.* The detention of some eight hours prior to petitioner's confession certainly cannot be said to have resulted in a denial of "that fundamental fairness essential to the very concept of justice" (*Lisenba* v. *California*, 314 U. S. 219, 236).

See,

Lyons v. *Oklahoma*, 322 U. S. 596, 605.

The courts have refused to assume the presence of a magistrate at other than office hours. *Pierce* v. *United States*, 197 F. 2d 189, 193, cert. denied, 344 U. S. 846; *Garner* v. *United States*, 174 F. 2d 499, 502, 503, cert. denied, 337 U. S. 945.

It is, of course, settled that the case of *McNabb* v. *United States*, 318 U. S. 332, is not controlling in State prosecutions but only in federal. Thus, in *Gallegos* v. *Nebraska*, 342 U. S. 55, 64, this Court declared:

> "Compliance with the McNabb rule is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. That power over state criminal trials is not vested in this Court."

Accord:

Cicenia v. *Lagay*, 357 U. S. 504 at 509;
Crooker v. *California*, 357 U. S. 433, 439 (footnote 4).

Thus, it is quite evident that there was no "unlawful detention" of petitioner prior to his arraignment. As the Court of Appeals said in affirming the judgment of conviction (*People* v. *Spano*, *supra*, 4 N. Y. 2d at 262):

> "All that has been said assumes that there was in fact an *unlawful detention* of the defendant in this case. *That fact is by no means established in the record.* When defendant surrendered shortly after seven o'clock at night on February 4th the County Court had recessed for the day. *The arraignment was had as soon thereafter as the courts reopened*, at about 10:00 A. M. the following morning. Moreover, since the court had not 'adjourned for the term' there was no injunction in the warrant requiring that

defendant be turned over to the warden of the city prison." (Italics ours.)

Cf., N. Y. Penal Law, § 1844.

B.

The confession was unquestionably true.

At page 60 of his brief, upon the appeal to the New York Court of Appeals, Spano specifically declared:

> *"The defendant in the case at bar does not deny that he shot Palermo and that he died from the wounds thus inflicted."*

Moreover, it is quite apparent that the confession Spano gave to the police and an Assistant District Attorney, following his voluntary surrender, was substantially consistent with the statement he had made to his friend, Patrolman Bruno, while still a fugitive, and with the testimony of Peter Guerriero, an eyewitness to the crime. The confession, therefore, would clearly appear to be the truth. As a matter of fact, it is apparent that petitioner attempted to make it as exculpatory as possible since he indicated that he was frightened and did not really know what he was doing when he fired the gun (2476-2484, 2487).

In *Ziang Sung Wan* v. *United States*, 266 U. S. 1, at p. 14, this Court asserted:

> "A confession is voluntary in law, if, but only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them."

In accordance with proper New York procedure, the Trial Court thoroughly instructed the jury on the factual issue of whether the confession was voluntary (3993-3997, 4068-4081), and left it for their determination *(Stein* v. *New York, supra)*.

As the New York Court of Appeals explained in its opinion of affirmance, the test to be applied in construing whether a confession is or is not voluntary is to determine whether it conforms with the statutory specifications of Section 395, N. Y. Code Crim. Pro. (*People* v. *Spano*, *supra*, 4 N. Y. 2d at 263):

> "In our State law the test to be applied to the instant confession is that which was crystallized in section 395 of the Code of Criminal Procedure requiring a determination as to whether a confession was voluntarily made in the traditional and ordinary sense, i.e., without duress, mental or physical. This is also the standard against which the confession must be measured for the purpose of determining whether or not it comports with the constitutional requirements of due process (*Gallegos* v. *Nebraska*, 342 U. S. 55, 65; *Brown* v. *Mississippi*, 297 U. S. 278, 285-286; *Stroble* v. *California*, *supra*; p. 197; *Stein* v. *New York*, *supra*, pp. 187-188). Obviously, since the confession before us was not extracted by means of threats, fear or violence but was freely or voluntarily given, there can be no valid objection to its admission on either of these grounds. Certainly, even the most vigilant guardian of civil liberties cannot fairly equate the present situation to that before the Supreme Court in *Rochin* v. *California* (342 U. S. 165) where it was held that admission in evidence of a confession procured by 'unlawfully assaulting, battering, torturing and falsely imprisoning the defendant' (*Rochin* v. *California*, *supra*, p. 167) deprived him of due process of law. The facts in this case show nothing comparable; *there was here no coercion, violence or brutality to the person of the defendant* (see *Irvine* v. *California*, 347 U. S. 128, 133)." (Italics ours.)

Recently, in the case of *Crooker* v. *California*, *supra*, this Court summarized the law with respect to statements taken of a State prisoner prior to arraignment (357 U. S. at p. 437):

"The bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained. *Brown* v. *Allen*, 344 U. S. 443, 476 (1953). Neither does an admonition by the police to tell the truth, *Sparf* v. *United States*, 156 U. S. 51, 55-56 (1895), nor the failure of state authorities to comply with local statutes requiring that an accused promptly be brought before a magistrate. *Filkes* v. *Alabama*, 352 U. S. 191 (1957)."

POINT TWO

Spano, who had consulted an attorney of his own choosing prior to his surrender, had been fully apprised of his legal rights. The fact that he had already been indicted did not endow him with rights superior to those to which any other accused would have been entitled.

The petitioner was in a far better position than many other suspected or accused persons find themselves when arrested and charged with crime. In most instances these individuals have not had an opportunity to discuss their legal problems with an attorney and consequently are usually uninformed of their legal rights. Spano, however, had consulted an attorney and presumably had been fully apprised of his constitutional and statutory prerogatives. The evidence adduced at trial establishes that petitioner adhered to this advice during the intermittent questioning by the police and an Assistant District Attorney (Cf.: *People* v. *Randazzio*, 194 N. Y. 147, 160).

It was only following his conversation with Patrolman Gaspar Bruno, a long time friend, that Spano decided to give a statement. Even then, Spano's confession contained exculpatory explanations, confirming that it was clearly a product of his own free choice.

The petitioner argues in his brief (Pet. Brief, p. 6) that "It is admitted that with the filing of the indictment, the

period of investigation ceased, and judicial proceeding commenced * * *." While judicial proceedings may have commenced with the filing of the indictment (N. Y. Code Crim. Pro. § 144), it certainly is *not* admitted or conceded by the respondent that the time for investigation had terminated. Indeed, it is difficult, if not impossible to determine when an investigation ever ceases prior to final judgment in an important criminal case.

Moreover, it is quite obvious that while the *dissent* in the New York Court of Appeals employed the term "judicial proceeding" with respect to the privilege against self-incrimination in New York State, the term "judicial proceeding" applies only "where incriminatory disclosure had been extorted by the constraint of legal process directed against the witness". *People* v. *Defore*, 242 N. Y. 13, 25; *Adams* v. *New York*, 192 U. S. 585, 597, 598. The confession was not obtained during the course of a "judicial proceeding" but, in actuality, it was anything but a judicial proceeding.

Not everything that occurs, following an indictment, is necessarily a "judicial proceeding upon the indictment". Since the privilege against self-incrimination did not apply to the proceeding during which the petitioner confessed, it is difficult to understand upon what basis he would predicate or evoke the privilege to exclude his confession.

A.

Petitioner was not entitled to have counsel present during the course of his prearraignment interrogation.

This Court has recognized that the right to counsel arises *upon arraignment* and not before. In the case of *Avery* v. *Alabama*, 308 U. S. 444, the unanimous opinion (per Black, J.) declared (308 U. S. at 445):

> "* * * but counsel were duly appointed for petitioner by the trial court as required both by Alabama law and the Fourteenth Amendment."

Continuing, the opinion observed (308 U. S. at 450):

> "Petitioner has thus been afforded the assistance of zealous and earnest counsel *from arraignment* to final argument in this Court." (Italics ours.)

Again, in *Stroble* v. *California*, 343 U. S. 181, this Court consistently ruled (p. 196 of 343 U. S.):

> "We conclude that petitioner received the full assistance of competent counsel. * * * On that question, as on all others, he has been afforded 'the assistance of zealous and earnest counsel from arraignment to final argument in this Court'. *Avery* v. *Alabama*, 308 U. S. 444, 450 (1940)."

In the recent cases of *Crooker* v. *California*, *supra*, and *Cicenia* v. *Lagay*, *supra*, this Court was confronted by situations in which State authorities had refused to permit an accused the opportunity to confer with counsel during police interrogation. In both cases, this Court affirmed the judgments, thereby sustaining the State Courts' views that there is no absolute right to have counsel present during police interrogation prior to arraignment, despite the fact that the accused has made a request therefor.

In *Cicenia*, at page 509 of 357 U. S., Mr. Justice Harlan cogently disposed of the petitioner's claim in that proceeding. The reasoning is equally applicable to the case at bar:

> "In contrast, petitioner would have us hold that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved. *Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel.* Even in federal prosecutions this Court has refrained from laying down any such inflexible rule. See *McNabb* v. *United States*, *supra*, *Mallory* v. *United States*, 354 U. S. 449. Still less should we impose this standard on each of the 48 States as a matter of constitutional compulsion. It is well known

> that law-enforcement problems vary widely from State to State, as well as among different communities within the same State. This Court has often recognized that it is of the 'very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice.' *Hoag* v. *New Jersey*, 356 U. S. 464, 468. See *Maxwell* v. *Dow*, 176 U. S. 581; *Twining* v. *New Jersey*, 211 U. S. 78." (Italics ours.)

In *Crooker* v. *California, supra*, Mr. Justice Clark, writing for the majority of this Court, aptly declared (p. 437 of 357 U. S.):

> "Petitioner's claim of coercion, then, depends almost entirely on denial of his request to contact counsel. This Court has not previously had occasion to determine the character of a confession obtained after such a denial. But we have held that confessions made by indigent defendants prior to state appointment of counsel are not thereby rendered involuntary, even in prosecutions where conviction without counsel would violate due process under the Fourteenth Amendment. *Brown* v. *Allen*, 344 U. S. 443, 474-476 (1953); *Stroble* v. *California*, 343 U. S. 181, 196-198 (1952); *Gallegos* v. *Nebraska*, 342 U. S. 55, 64-68 (1951)."

Continuing the Court's opinion in the *Crooker* case, Mr. Justice Clark analyzed these contentions which are similar to Spano's (357 U. S. at 439):

> "Under these principles, state refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, *Chandler* v. *Fretag, supra*, but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.' *Lisenba* v. *California*, 314 U. S. 219, 236 (1941)."

This Court, in the *Crooker* case, disposed of the petitioner's contentions there, which likewise reveal the fallacy of Spano's protestations (357 U. S. at p. 441):

> "Refusal by state authorities of the request to contact counsel necessarily would then be an absolute bar to conviction. On the other hand, where an event has occurred while the accused was without his counsel which fairly promises to adversely affect his chances, the doctrine suggested by petitioner would have a lesser but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney. Due process, a concept 'less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights,' *Betts v. Brady*, 316 U. S. 455, 462 (1942), demands no such rule."

It is interesting to note that in *Avery* v. *Alabama*, *supra*, this Court was confronted by a situation quite similar to the instant case. Avery *had been indicted* for the crime of murder in 1934 but fled the jurisdiction. He was apprehended in Pittsburgh several years later and was interrogated prior to his arraignment. While no issue was raised in this Court as to whether Avery was entitled to counsel prior to arraignment by virtue of the indictment lodged against him, the respondent has already adverted to the fact that the opinion of this Court declared that the right to counsel had been observed by affording an *attorney at arraignment* and throughout the proceedings thereafter.

At folio 18 of the record on appeal in the *Avery* case, it is quite apparent that Avery preserved his rights in the Trial Court by excepting to the introduction of the pre-arraignment statements, albeit not because an indictment was pending against him.

Folio 1 of the record on appeal in *Avery* reveals that the indictment was filed in 1934. Although the issue has,

perhaps, not been raised in this Court directly heretofore, it is not at all unusual for a fugitive, who is known to have committed a crime, to be indicted prior to his apprehension. This procedure not only tolls the running of the statute of limitations (not a matter of concern in a capital case) but makes it more convenient and practical to enlist the aid of the Federal Bureau of Investigation and sister State police agencies in efforts to capture the accused. An indictment is no more than a formal accusation of crime. The quantum of proof necessary to indict in the State of New York is less than that required to convict, so investigations do not necessarily cease with indictment.

Cf., N. Y. Code Crim. Pro., §§ 251 and 389.

Where a serious crime has been committed, such as was the situation in the matter at bar, the police have a duty to conduct an investigation to verify the accuracy of the charges. In this case, Patrolman Bruno had already informed the police of petitioner's confession to him on the telephone and the Court below aptly observed (*People* v. *Spano, supra,* 4 N. Y. 2d at 262):

> "In any event it was the duty of the police to verify the accuracy of the version of the conversation with the defendant given by Bruno. • • • The fact, impressed upon us by defendant, that he had been told by his attorney to disclose nothing but his name indicates that the *subsequent interrogation was anticipated.*" (Italics ours)

The defendant in *Lisenba* v. *California, supra,* was actually incarcerated in the City Jail on another charge when he was interrogated, in the absence of his attorney, about the murder of his wife. Lisenba's attorney had previously advised him that he would be indicted for the murder of his wife and cautioned him to remain silent. The confession, which was found to have been voluntarily made, was admitted into evidence and this Court affirmed the judgment of conviction, despite the fact that Lisenba's attorney had not been called as he had requested.

B.

There exists no duty to advise an accused of his right to counsel prior to arraignment.

The duty to advise an accused of his right to counsel does not exist in the State of New York prior to arraignment (Code Crim. Pro. §§ 188, 189, 296-a, 308, 699; *Spano* v. *New York, supra*, 4 N. Y. 2d 256, 264).

See, too,

Leland v. *Oregon*, 343 U. S. 790, Rehearing den. 344 U. S. 848;
Crooker v. *California, supra;*
Cicenia v. *Lagay, supra;*
People v. *Randazzio*, 194 N. Y. 147, 158.

Even under the Federal Rules of Criminal Procedure, there is no obligation to advise a defendant, prior to arraignment, of his right to counsel.

See:

Fed. Rules Crim. Proc., Rule 44;
44 Ky. L. J. 103;
3 A. L. R. 2d 1003.

In *State* v. *Bunk*, 4 N. J. 461, the Supreme Court of New Jersey, declared (p. 470):

> "In answer to the argument that the defendants were not advised of their rights and privileges the law over the years in this State has been that *a person is only entitled to counsel to aid him in his defense, not to save him from his own voluntary acts* * * * and such cautionary instructions are not an essential step in the establishment of the fact that a confession is voluntary." (Italics ours)

The law in New Jersey is consonant with the law of New York and most other jurisdictions.

III Wigmore on Evidence (3 Ed.) § 851.
See, generally, Beaney, The Right to Counsel in American courts (1955 U. of Mich. Press).

Petitioner's efforts to equate the circumstances under which the confession in the case at bar was obtained, with those that existed in *Rochin* v. *California*, 342 U. S. 165 or *Malinski* v. *New York*, 324 U. S. 401, and similar cases, are obvious attempts to create a misleading impression. The questioning of Spano was on a casual basis and there was no psychological or physical coercion employed.

See, *Spano* v. *New York, supra*, 4 N. Y. 2d at 263.

POINT THREE

Petitioner's right to counsel was not violated.

The respondent has already demonstrated that the duty to advise a person accused of crime, who has been taken into custody, of his legal rights, does not arise until arraignment. This is true not only under the statutes of the State of New York but also in federal jurisdictions and throughout most, if not all, of the States in the union. Spano, however, insists that his right to counsel was denied because the police were unable to contact his lawyer and produce him during prearraignment interrogation. This Court has considered and rejected the very proposition advanced by petitioner in the matter at bar, in the recent cases of *Cicenia* v. *Lagay* and *Crooker* v. *California, supra.*

If the circumstances of the proceeding herein had revealed that Spano had never consulted an attorney or received legal advice prior to his surrender, his contentions might be more appealing, but would still be meritless. Such circumstances, of course, do not exist in the matter at bar, since Spano concedes that he was advised of his legal rights prior to his surrender.

The inescapable conclusion one must draw from petitioner's position with respect to the right to counsel is that he seeks to adopt the very proposal which was denounced by this Court in the *Cicena* and *Crooker* cases, *supra*. Spano would have this Court announce an edict that would severely hamper and frustrate effective law enforcement. In view of the alarming increase in the number of reported major crimes in this country, the respondent submits that such additional hindrances of police authority are neither warranted nor required under due process of law.

See:

Hearings on S. Res. 234 Before d Subcommittee on Constitutional Rights of the Committee on the Judiciary, 85th Cong. March 7 and 11, 1958, pp. 2-12; 123-135.

In Mr. Justice Jackson's concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49, and dissenting opinions in *Harris* v. *South Carolina*, 338 U. S. 68, and *Turner* v. *Pennsylvania*, 338 U. S. 62, he cogently explains how disastrous an impact a rule such as petitioner urges, would be wrought upon law enforcement and society, in general, if adopted. In *Watts*, at page 57 of 338 U. S., Justice Jackson observes, that while it may be a peril to individual freedom to subject one without counsel to questioning, it likewise poses a serious peril to the solution of crime "because in our adversary system he [an attorney] deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem."

Professor Wigmore, in his treatise on evidence, had occasion to discuss an analogous problem. Although Wigmore was analyzing the situation under the Fourth Amendment, the analogy is equally apropos to the problem in the matter before this Court. In a "parable" set forth in the treatise, the following is stated:

"Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." VIII Wigmore on Evidence (3rd ed.) § 2184, p. 40.

See, too:

47 Georgetown L. J. 1, 27;
1 Greenleaf, Evidence § 254a (16th ed. 1899).

There is no question whatsoever, from the record in the case at bar, that Spano was represented by counsel at his arraignment and upon every proceeding thereafter. This certainly complied with even the most stringent requirements for counsel.

See:

Canizio v. *New York*, 327 U. S. 82;
Lisenba v. *California*, *supra*;
Stroble v. *California*, *supra*;
Ashdown v. *Utah*, 357 U. S. 426;
Avery v. *Alabama*, *supra*.

What petitioner seems to overlook is that the Sixth Amendment to the Constitution, even if it were applicable to the case at bar, which it is not, would not require assignment of counsel prior to arraignment.

This Court, in *Gallegos* v. *Nebraska*, *supra*, declared (342 U. S. at p. 64):

"The Federal Constitution does not command a state to furnish defendants counsel as a matter of course, as is required by the Sixth Amendment in federal prosecution."

But, even the Sixth Amendment would have been satisfied herein.

The New York Constitution does not compel or prescribe the assignment of counsel at any stage earlier than the arraignment (N. Y. Const. Art. I, § 6). In short, it is unequivocally manifest that Spano's rights to counsel were protected at all stages of the "judicial proceedings" upon his indictment.

Let us assume that Spano had not surrendered voluntarily but had been apprehended in another State, or, for that matter, in another part of New York State. Under petitioner's conception of what the law should be, it would seem that the police officers who would be dispatched to bring him back to New York City, would be precluded from discussing any matter pertaining to the case since it would obviously be difficult, if not impossible, to have an attorney assigned to accompany Spano. It would be equally difficult and unfeasible to have a retained attorney accompany the police officers. It requires very little imagination to visualize the dilemma this would pose to law enforcement authorities. In effect, the police would have to sit "mummy-like" on the trip back to New York. Even if in general conversation Spano had made a full voluntary confession, he would nevertheless insist that it would be inadmissible at his trial because an attorney had not been present. There is no constitutional requirement, under due process of law, that would demand such a paradoxical result.

What of a defendant who is indigent and cannot afford an attorney? Petitioner, apparently, to be consistent, would have to maintain that the police could not question such a person either unless a proper attorney were assigned immediately upon arrest. Moreover, Spano necessarily must also contend that the police ought to inform one under indictment of his right to counsel, otherwise it could be claimed later that the accused did not understandingly waive the privilege.

The fact that has been all but ignored is that there is *no evidence whatsoever that Spano even knew that an indictment had been found against him.* That Section 1782, N. Y. Penal Law, makes it a misdemeanor for anyone to disclose the fact that an indictment has been found before the accused is in custody, bolsters the probability that Spano was unaware that he had been indicted at the time of his surrender.

It is evident that the attorney who surrendered Spano to the police fully expected that there would be attempts to question him. Were this not so, there would have been no logic to his instruction to petitioner to remain silent (*People* v. *Spano, supra,* 4 N. Y. 2d at 262). The fact of an indictment, in other words, according to petitioner, grants an accused an unqualified immunity from being questioned about the crime, and protects him even if he volunteers a statement of confession by precluding its use at a trial.

It appears to be of no significance to Spano that an indictment is nothing more than an accusation. In the *Lisenba* case, *supra,* the petitioner there was told, in no uncertain terms by his attorney, that he would be indicted for the murder of his wife. Yet this Court affirmed the judgment of conviction. In *Avery* v. *Alabama, supra,* the defendant there was under indictment at the time he was captured. A prearraignment statement was taken from him, apparently in the absence of counsel; nevertheless this Court affirmed the conviction.

For example, if fifty witnesses saw Spano shoot Palermo, the fact of an indictment could hardly make him *more* suspect. Petitioner, however, would apparently urge, anomalously, that a pre-arraignment statement would be admissible in evidence under such circumstances only if he had not yet been indicted. It is impossible to discern how

Spano's fundamental rights could have been adversely affected by virtue of the grand jury's true bill.

It would be a simple enough matter to withhold presentment of a case to a grand jury until after the accused has been apprehended and a statement obtained. In the foregoing example, however, would it be morally right, under Spano's conception of the law, to defer action on an indictment until the accused were apprehended? Certainly, this Court cannot be swayed by such a "Pickwickian" approach to criminal investigation. It is patent that if a man is already a prime suspect in a criminal investigation, the finding of an indictment will not affect his fundamental rights one way or another.

In the final analysis, the test is whether the pre-arraignment statement was obtained in a manner that violated "that fundamental fairness essential to the very concept of justice" (*Lisenba* v. *California*, *supra*, 314 U. S. at 236; *Crooker* v. *California*, *supra*, 357 U. S. at 439).

If "gossamer possibilities of prejudice" (*Snyder* v. *Massachusetts*, 291 U. S. 97, 122) are to be assumed merely because the suspect has been indicted, then it is plain that by a similar vein of reasoning, prejudice could be presumed by a plea of guilty or a confession in open court. It cannot seriously be disputed that a defendant pleading guilty in open Court usually would much rather not do so, except for the knowledge that his guilt is irrefutable or that he might be convicted of a higher degree of crime if he went to trial. Frequently, a defendant pleads guilty only after being "sold a bill of goods" by his own counsel.

The respondent submits that if a suspect is disposed to make a pre-arraignment statement to the police under circumstances clearly indicating that he is acting voluntarily, and that such statement is manifestly the truth, this Court ought not order it suppressed merely because he was under indictment at the time. The case at bar presents such a situation.

CONCLUSION

It is respectfully submitted that the order and judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

DANIEL V. SULLIVAN,
District Attorney, County of Bronx,
Attorney for Respondent.

WALTER E. DILLON,
IRVING ANOLIK,
IRVIN J. GOLDSMITH,
Assistant District Attorneys,
of Counsel.

SUPREME COURT OF THE UNITED STATES

No. 582.—October Term, 1958.

Vincent Joseph Spano, Petitioner,
v.
The People of the State of New York.

On Writ of Certiorari to the Court of Appeals of New York.

[June 22, 1959.]

Mr. Chief Justice Warren delivered the opinion of the Court.

This is another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment. As in all such cases, we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement. Because of the delicate nature of the constitutional determination which we must make, we cannot escape the responsibility of making our own examination of the record. *Norris* v. *Alabama*, 294 U. S. 587.

The State's evidence reveals the following: Petitioner Vincent Joseph Spano is a derivative citizen of this country, having been born in Messina, Italy. He was 25 years old at the time of the shooting in question and had graduated from junior high school. He had a record of regular employment. The shooting took place on January 22, 1957.

On that day, petitioner was drinking in a bar. The decedent, a former professional boxer weighing almost 200 pounds who had fought in Madison Square Garden, took some of petitioner's money from the bar. Petitioner followed him out of the bar to recover it. A fight ensued,

with the decedent knocking petitioner down and then kicking him in the head three or four times. Shock from the force of these blows caused petitioner to vomit. After the bartender applied some ice to his head, petitioner left the bar, walked to his apartment, secured a gun, and walked eight or nine blocks to a candy store where the decedent was frequently to be found. He entered the store in which decedent, three friends of decedent, at least two of whom were ex-convicts, and a boy who was supervising the store were present. He fired five shots, two of which entered the decedent's body, causing his death. The boy was the only eyewitness; the three friends of decedent did not see the person who fired the shot. Petitioner then disappeared for the next week or so.

On February 1, 1957, the Bronx County Grand Jury returned an indictment for first-degree murder against petitioner. Accordingly, a bench warrant was issued for his arrest, commanding that he be forthwith brought before the court to answer the indictment, or if the court had adjourned for the term, that he be delivered into the custody of the Sheriff of Bronx County. See N. Y. Code Crim. Proc. § 301.

On February 3, 1957, petitioner called one Gaspar Bruno, a close friend of 8 or 10 years' standing who had attended school with him. Bruno was a fledgling police officer, having at that time not yet finished attending police academy. According to Bruno's testimony, petitioner told him "that he took a terrific beating, that the deceased hurt him real bad and he dropped him a couple of times and he was dazed; he didn't know what he was doing and that he went and shot at him." Petitioner told Bruno that he intended to get a lawyer and give himself up. Bruno relayed this information to his superiors.

The following day, February 4, at 7:10 p. m., petitioner, accompanied by counsel, surrendered himself to

the authorities in front of the Bronx County Building, where both the office of the Assistant District Attorney who ultimately prosecuted his case and the courtroom in which he was ultimately tried were located. His attorney had cautioned him to answer no questions, and left him in the custody of the officers. He was promptly taken to the office of the Assistant District Attorney and at 7:15 p. m. the questioning began, being conducted by Assistant District Attorney Goldsmith, Lt. Gannon, Detectives Farrell, Lehrer and Motta, and Sgt. Clarke. The record reveals that the questioning was both persistent and continuous. Petitioner, in accordance with his attorney's instructions, steadfastly refused to answer. Detective Motta testified: "He refused to talk to me." "He just looked up to the ceiling and refused to talk to me." Detective Farrell testified:

"Q. And you started to interrogate him?
"A. That is right. . . .
"Q. What did he say?
"A. He said 'you would have to see my attorney. I tell you nothing but my name.' . . .
"Q. Did you continue to examine him?
"A. Verbally, yes, sir."

He asked one officer, Detective Ciccone, if he could speak to his attorney, but that request was denied. Detective Ciccone testified that he could not find the attorney's name in the telephone book.[1] He was given two sandwiches, coffee and cake at 11 p. m.

At 12:15 a. m. on the morning of February 5, after five hours of questioning in which it became evident that peti-

[1] How this could be so when the attorney's name, Tobias Russo, was concededly in the telephone book does not appear. The trial judge sustained objections by the Assistant District Attorney to questions designed to delve into this mystery.

tioner was following his attorney's instructions, on the Assistant District Attorney's orders petitioner was transferred to the 46th Squad, Ryer Avenue Police Station. The Assistant District Attorney also went to the police station and to some extent continued to participate in the interrogation. Petitioner arrived at 12:30 and questioning was resumed at 12:40. The character of the questioning is revealed by the testimony of Detective Farrell:

> "Q. Who did you leave him in the room with?
>
> "A. With Detective Lehrer and Sergeant Clark came in and Mr. Goldsmith came in or Inspector Halk came in. It was back and forth. People just came in, spoke a few words to the defendant or they listened a few minutes and they left."

But petitioner persisted in his refusal to answer, and again requested permission to see his attorney, this time from Detective Lehrer. His request was again denied.

It was then that those in charge of the investigation decided that petitioner's close friend, Bruno, could be of use. He had been called out on the case around 10 or 11 p. m., although he was not connected with the 46th Squad or Precinct in any way. Although, in fact, his job was in no way threatened, Bruno was told to tell petitioner that petitioner's telephone call had gotten him "in a lot of trouble," and that he should seek to extract sympathy from petitioner for Bruno's pregnant wife and three children. Bruno developed this theme with petitioner without success, and petitioner, also without success, again sought to see his attorney, a request which Bruno relayed unavailingly to his superiors. After this first session with petitioner, Bruno was again directed by Lt. Gannon to play on petitioner's sympathies, but again no confession was forthcoming. But the Lieutenant a third time ordered Bruno falsely to importune his friend to confess, but again petitioner clung to his attorney's advice.

Inevitably, in the fourth such session directed by the Lieutenant, lasting a full hour, petitioner succumbed to his friend's prevarications and agreed to make a statement. Accordingly, at 3:25 a. m. the Assistant District Attorney, a stenographer, and several other law enforcement officials entered the room where petitioner was being questioned, and took his statement in question and answer form with the Assistant District Attorney asking the questions. The statement was completed at 4:05 a. m.

But this was not the end. At 4:30 a. m. three detectives took petitioner to Police Headquarters in Manhattan. On the way they attempted to find the bridge from which petitioner said he had thrown the murder weapon. They crossed the Triborough Bridge into Manhattan, arriving at Police Headquarters at 5 a. m., and left Manhattan for the Bronx at 5:40 a. m. via the Willis Avenue Bridge. When petitioner recognized neither bridge as the one from which he had thrown the weapon, they reentered Manhattan via the Third Avenue Bridge, which petitioner stated was the right one, and then returned to the Bronx well after 6 a. m. During that trip the officers also elicited a statement from petitioner that the deceased way always "on [his] back," "always pushing" him and that he was "not sorry" he had shot the deceased. All three detectives testified to that statement at the trial.

Court opened at 10 a. m. that morning, and petitioner was arraigned at 10:15.

At the trial, the confession was introduced in evidence over appropriate objections. The jury was instructed that it could rely on it only if it was found to be voluntary. The jury returned a guilty verdict and petitioner was sentenced to death. The New York Court of Appeals affirmed the conviction over three dissents, 4 N. Y. 2d 256, 173 N. Y. S. 2d 793, 150 N. E. 2d 226, and we granted certiorari to resolve the serious problem presented under the Fourteenth Amendment. 358 U. S. 919.

Petitioner's first contention is that his absolute right to counsel in a capital case, *Powell* v. *Alabama*, 287 U. S. 45, became operative on the return of an indictment against him, for at that time he was in every sense a defendant in a criminal case, the grand jury having found sufficient cause to believe that he had committed the crime. He argues accordingly that following indictment no confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment. He seeks to distinguish *Crooker* v. *California*, 357 U. S. 426, and *Cicenia* v. *Lagay*, 357 U. S. 504, on the grounds that in those cases no indictment had been returned. We find it unnecessary to reach that contention, for we find use of the confession obtained here inconsistent with the Fourteenth Amendment under traditional principles.

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases.[2] Those

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[2] *E. g.*, *Cicenia* v. *Lagay*, 357 U. S. 504; *Crooker* v. *California*, 357 U. S. 433; *Ashdown* v. *Utah*, 357 U. S. 426; *Payne* v. *Arkansas*, 356 U. S. 560; *Thomas* v. *Arizona*, 356 U. S. 390; *Pikes* v. *Alabama*, 352 U. S. 191; *Leyra* v. *Denno*, 347 U. S. 556; *Stein* v. *New York*, 346 U. S. 156; *Brown* v. *Allen*, 344 U. S. 443; *Stroble* v. *California*, 343 U. S. 181; *Gallegos* v. *Nebraska*, 342 U. S. 55; *Johnson* v. *Pennsylvania*, 340 U. S. 881; *Harris* v. *South Carolina*, 338 U. S. 68; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Watts* v. *Indiana*, 338 U. S. 49; *Lee* v. *Mississippi*, 332 U. S. 742; *Haley* v. *Ohio*, 332 U. S. 596; *Malinski* v. *New York*, 324 U. S. 401; *Lyons* v. *Oklahoma*, 322 U. S. 596; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Ward* v. *Texas*, 316 U. S. 547;

cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. The facts of no case recently in this Court have quite approached the brutal beatings in *Brown* v. *Mississippi*, 297 U. S. 278 (1936), or the 36 consecutive hours of questioning present in *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944). But as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made. Our judgment here is that, on all the facts, this conviction cannot stand.

Petitioner was a foreign born young man of 25 with no past history of law violation or of subjection to official interrogation, at least insofar as the record shows. He had progressed only one-half year into high school and the record indicates that he had a history of emotional instability.[3] He did not make a narrative statement, but was subject to the leading questions of a skillful prosecutor in a question and answer confession. He was subjected to questioning not by a few men, but by many.

Lisenba v. *California*, 314 U. S. 219; *Vernon* v. *Alabama*, 313 U. S. 547; *Lomax* v. *Texas*, 313 U. S. 544; *White* v. *Texas*, 310 U. S. 530; *Canty* v. *Alabama*, 309 U. S. 629; *Chambers* v. *Florida*, 309 U. S. 227; *Brown* v. *Mississippi*, 297 U. S. 278.

[3] Medical reports from New York City's Fordham Hospital introduced by defendant showed that he had suffered a cerebral concussion in 1955. He was described by a private physician in 1951 as "an extremely nervous tense individual who is emotionally unstable and maladjusted," and was found unacceptable for military service in 1951, primarily because of "Psychiatric disorder." He failed the Army's AFQT–1 intelligence test. His mother had been in mental hospitals on three separate occasions.

They included Assistant District Attorney Goldsmith, one Hyland of the District Attorney's Office, Deputy Inspector Halks,[4] Lieutenant Gannon, Detective Ciccone, Detective Motta, Detective Lehrer, Detective Marshal, Detective Farrell, Detective Leira,[5] Detective Murphy, Detective Murtha, Sergeant Clarke, Patrolman Bruno and Stenographer Baldwin. All played some part, and the effect of such massive official interrogation must have been felt. Petitioner was questioned for virtually eight straight hours before he confessed, with his only respite being a transfer to an arena presumably considered more appropriate by the police for the task at hand. Nor was the questioning conducted during normal business hours, but began in early evening, continued into the night, and did not bear fruition until the not-too-early morning. The drama was not played out, with the final admissions obtained, until almost sunrise. In such circumstances slowly mounting fatigue does, and is calculated to, play its part. The questioners persisted in the face of his repeated refusals to answer on the advice of his attorney, and they ignored his reasonable requests to contact the local attorney whom he had already retained and who had personally delivered him into the custody of these officers in obedience to the bench warrant.

The use of Bruno, characterized in this Court by counsel for the State as a "childhood friend" of petitioner's, is another factor which deserves mention in the totality of the situation. Bruno's was the one face visible to petitioner in which he could put some trust. There was a bond of friendship between them going back a decade into adolescence. It was with this material that the officers felt that they could overcome petitioner's will. They instructed Bruno falsely to state that petitioner's

[4] His name is sometimes spelled "Hawks."

[5] Although each is referred to separately in the record, it may be that Detectives Lehrer and Leira are the same person.

telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child. And Bruno played this part of a worried father, harried by his superiors, in not one, but four different acts, the final one lasting an hour. Cf. *Leyra* v. *Denno*, 347 U. S. 556. Petitioner was apparently unaware of John Gay's famous couplet:

> "An open foe may prove a curse,
> But a pretended friend is worse,"

and he yielded to his false friend's entreaties.

We conclude that petitioner's will was overborn by official pressure, fatigue and sympathy falsely aroused, after considering all the facts in their post-indictment setting.[8] Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. Compare *Crooker* v. *California*, *supra*, and *Cicenia* v. *Lagay*, *supra*. They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these. *Malinski* v. *New York*, 324 U. S. 401. Accordingly, we hold that petitioner's conviction cannot stand under the Fourteenth Amendment.

The State suggests, however, that we are not free to reverse this conviction, since there is sufficient other evi-

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[8] *Lisenba* v. *California*, 314 U. S. 219, is not to the contrary. There, while petitioner had already been arraigned on an incest charge, his later questioning and confession concerned a murder.

dence in the record from which the jury might have found guilt, relying on *Stein* v. *New York*, 346 U. S. 156. But *Payne* v. *Arkansas*, 356 U. S. 560, 568, authoritatively establishes that *Stein* did not hold that a conviction may be sustained on the basis of other evidence if a confession found to be involuntary by this Court was used, even though limiting instructions were given. *Stein* held only that when a confession is not found by this Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied on it. The judgment must be

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 582.—October Term, 1958.

Vincent Joseph Spano, Petitioner, v. The People of the State of New York. } On Writ of Certiorari to the Court of Appeals of New York.

[June 22, 1959.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Brennan joins, concurring.

While I join the opinion of the Court, I add what for me is an even more important ground of decision.

We have often divided on whether state authorities may question a suspect for hours on end when he has no lawyer present and when he has demanded that he have the benefit of legal advice. See *Crooker* v. *California*, 357 U. S. 433, and cases cited. But here we deal not with a suspect but with a man who has been formally charged with a crime. The question is whether after the indictment and before the trial the Government can interrogate the accused *in secret* when he asked for his lawyer and when his request was denied. This is a capital case; and under the rule of *Powell* v. *Alabama*, 287 U. S. 45, the defendant was entitled to be represented by counsel. This representation by counsel is not restricted to the trial. As stated in *Powell* v. *Alabama*, *supra*, p. 57:

> "during perhaps the most crucial period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. We do not have here mere suspects who are being secretly interrogated by the police as in *Crooker* v. *California, supra*, nor witnesses who are being questioned in secret administrative or judicial proceedings as in *In re Groban*, 352 U. S. 330, and *Anonymous Nos. 6 & 7* v. *Baker*, — U. S. —. This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel. This seems to me to be a flagrant violation of the principle announced in *Powell* v. *Alabama, supra*, that the right of counsel extends to the preparation for trial, as well as to the trial itself. As Professor Chafee once said, "A person accused of crime needs a lawyer right after his arrest probably more than at any time." Chafee, Documents on Fundamental Human Rights, Pamphlet 2 (1951–1952), p. 541. When he is deprived of that right after indictment and before trial, he may indeed be denied effective representation by counsel at the only stage when legal aid and advice would help him. This *secret inquisition* by the police when defendant asked for and was denied counsel was as serious an invasion of his constitutional rights as the denial of a continuance in order to employ counsel was held to be in *Chandler* v. *Fretag*, 348 U. S. 3, 10. What we said in *Avery* v. *Alabama*, 308 U. S. 444, 446, has relevance here:

". . . the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of coun-

sel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel."

I join with Judges Desmond, Fuld, and Van Voorhis of the New York Court of Appeals (4 N. Y. 2d 256, 266), in asking, what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses? In that event the secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights.

SUPREME COURT OF THE UNITED STATES

No. 582.—October Term, 1958.

Vincent Joseph Spano, Petitioner, v. The People of the State of New York. } On Writ of Certiorari to the Court of Appeals of New York.

[June 22, 1959.]

Mr. Justice Stewart, whom Mr. Justice Douglas and Mr. Justice Brennan join, concurring.

While I concur in the opinion of the Court, it is my view that the absence of counsel when this confession was elicited was alone enough to render it inadmissible under the Fourteenth Amendment.

Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime. See *Crooker* v. *California*, 357 U. S. 433; *Cicenia* v. *LaGay*, 357 U. S. 504. When the petitioner surrendered to the New York authorities he was under indictment for first degree murder.

Under our system of justice an indictment is supposed to be followed by an arraignment and a trial. At every stage in those proceedings the accused has an absolute right to a lawyer's help if the case is one in which a death sentence may be imposed. *Powell* v. *Alabama*, 287 U. S. 45. Indeed the right to the assistance of counsel whom the accused has himself retained is absolute, whatever the offense for which he is on trial. *Chandler* v. *Fretag*, 348 U. S. 3.

What followed the petitioner's surrender in this case was not arraignment in a court of law, but an all-night inquisition in a prosecutor's office, a police station, and an automobile. Throughout the night the petitioner

repeatedly asked to be allowed to send for his lawyer, and his requests were repeatedly denied. He finally was induced to make a confession. That confession was used to secure a verdict sending him to the electric chair.

Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station.